



July 1, 2008

Via Electronic Filing

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW – A325
Washington, DC 20554

Re: WT Docket Nos. 07-195 & 04-356 – Written *Ex Parte* Submission

Dear Ms. Dortch:

M2Z respectfully submits this response to claims made by CTIA in an *ex parte* letter filed on June 26, 2008, in the above captioned dockets.¹ As explained more fully below, the assertion in CTIA's latest *ex parte* that the Commission lacks authority to require free service in the AWS-3 band is – much like other arguments made in a string of recent CTIA submissions – without merit. M2Z once again responds nonetheless in order to correct the record regarding the Commission's authority to adopt its proposal for the AWS-3 band as set forth in the *Further Notice* in this proceeding.²

CTIA's assertions founder, once again, primarily because of its continued refusal to acknowledge the Commission's considerable authority to regulate the use of radio spectrum. As CTIA must know, the Commission has ample statutory authority to require the AWS-3 band licensee to provide "free, two-way broadband Internet service." Title III of the Communications Act authorizes the Commission to regulate "radio communications" and the "transmission of energy by radio."³ Under Title III, the Commission has the power to grant, modify, classify, and revoke station licenses.⁴ As part of this licensing authority, Title III *requires* that the Commission "prescribe such restrictions and conditions" on spectrum licenses as "the public convenience, interest, or necessity requires" and as may be necessary

¹ See Letter from Paul W. Garnett, CTIA, to Ms. Marlene H. Dortch, WT Docket Nos. 04-356, 07-195 (filed June 26, 2008).

² See *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, WT Docket No. 07-195, Further Notice of Proposed Rulemaking, FCC 08-158 (rel. June 20, 2008) ("*Further Notice*").

³ 47 U.S.C. § 301, *et seq.*

⁴ See, e.g., *id.* §§ 302-03, 307-09, 312, 316.

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to carry out the provisions of the Act.⁵ The Commission also is responsible for prescribing “the nature of the service to be rendered by each class of licensed stations and each station within any class” and “generally encourag[ing] the larger and more effective use of radio in the public interest.”⁶ In addition, the Commission has broad powers to take action necessary to execute its functions and to carry out the provisions of the Act.⁷ Thus, the Commission has the authority to establish license conditions and operational obligations that further the goals of the Act.⁸

Section 309(j)(3) provides additional authority for the Commission’s proposal, as outlined in the *Further Notice*. That section requires the Commission to “include safeguards to protect the public interest” when specifying eligibility and other license characteristics.⁹ It also tasks the Commission with promoting the purposes of the Act and six enumerated goals detailed in Section 309(j)(3). These objectives include “the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays”; “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants”; “recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource”; and “efficient and intensive use of the electromagnetic spectrum.” The Commission’s proposal for the AWS-3 band is consistent with this Congressional directive. Specifically, the Commission stated in the *Further Notice* that the goal of its free wireless broadband proposal “is to promote the deployment and ubiquitous availability of broadband services across the country and to facilitate the use of AWS spectrum for the benefit of consumers.”¹⁰

CTIA’s claim that the Commission is barred from requiring the AWS-3 licensee to provide free nationwide wireless broadband service because such action would constitute “classic common carrier regulation” is both wrong and irrelevant. Although CTIA is quick to point out that wireless broadband Internet access service is a Title I service and is not

⁵ See *id.* § 303(r); see also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992) (noting that the Communications Act invests the Commission with “enormous discretion” in promulgating license obligations that the agency determines will serve the public interest, and that the Commission’s broad mandate in this regard “correspondingly limits the practical scope of responsible judicial review”).

⁶ See 47 U.S.C. § 303(b), (g).

⁷ *Id.* § 154(i) (stating that the Commission “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions”).

⁸ See *id.* § 303(r); see also *Schurz Communications, Inc. v. FCC*, 982 F.2d at 1048; *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, ¶ 207 (2007) (“700 MHz Second Report and Order”).

⁹ 47 U.S.C. § 309(j)(3).

¹⁰ *Further Notice* ¶ 1; see also 47 U.S.C. § 151 (stating that one of the purposes for the creation of the FCC is to foster “a rapid, efficient . . . radio communication service with adequate facilities at reasonable charges”).

currently subject to obligations under Title II of the Communications Act, CTIA overlooks the Commission's own statement that such classification "does not affect the general applicability of the spectrum allocation and licensing provisions of Title III and the Commission's rules" to wireless broadband Internet access services.¹¹ As the Commission stated:

Application of provisions governing access to and use of spectrum (and their corresponding Commission rules) is not affected by whether the service using the spectrum is classified as a telecommunications or information service under the Act. Accordingly, our decision today to classify wireless broadband Internet access services as information services does not affect the applicability of Title III provisions and corresponding Commission rules to these services.¹²

The Commission's licensing regulations – and the underlying statutory authority for the Commission's authority to impose such conditions in the public interest – continue to apply, whether the service is classified as a telecommunications service or an information service, *because the service is using radio spectrum*.¹³

The Commission's proposal to adopt service rules and license conditions for the AWS-3 licensee that are rooted in Title III – and thus not dependent on Title I and Title II classifications – is not novel. In the 700 MHz proceeding, for example, the Commission relied on its Title III licensing authority and other statutory provisions to adopt an open platform requirement for the C Block licenses.¹⁴ The affected 700 MHz licensees will almost certainly offer the same type of "wireless broadband Internet access service" described by CTIA, yet the Commission had no difficulty finding sufficient authority in Title III to adopt open device and open application requirements affecting the licensees' access to and potential use of the 700 MHz spectrum.

In addition, the Commission in 1999 similarly used its Title III authority to extend resale requirements to enhanced services provided by CMRS carriers.¹⁵ In doing so, the

¹¹ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶ 35 (2007).

¹² *Id.* ¶ 36.

¹³ *Id.* ¶ 35.

¹⁴ *700 MHz Second Report and Order* ¶ 207 ("As a general matter, the Commission has the authority to establish license conditions and operational obligations, such as the requirements we adopt here, if the condition or obligation will further the goals of the Communications Act without contradicting any basic parameters of the agency's authority."); *see also id.* ¶ 207 n.471 (listing sources of authority). In adopting the requirements, the Commission rejected several arguments made by Verizon Wireless, including one asserting that the Commission's imposition of such requirements would be inconsistent with prior determinations regarding the regulation of broadband services. *See id.* ¶¶ 208-09.

¹⁵ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340, ¶ 27 (1999).

Commission explained that “[a]rguments that the scope of the resale rule is overbroad because it extends to non-Title II services are inapt,” explaining as well that it had already rejected such arguments earlier in that proceeding and that it had “specifically cited its Title III licensing authority as part of its jurisdictional authority for the resale rule.”¹⁶ The Commission noted in the end that “[n]o party has challenged our explicit invocation of Title III as a basis for imposing the resale rule” on such non-Title II services, citing provisions in Section 303(r) and 309 that grant the Commission authority “to make such rules and regulations as may be necessary to carry out the provisions of the Act insofar as it relates to radio communications” and “to determine the conditions to be attached to radio licenses.”¹⁷

The Commission also has used its Title III authority in ways even more closely analogous to what CTIA might characterize, albeit erroneously, as “rate regulation” or “common carrier regulation.” Regulations founded on Title III and requiring the provision of free service in order to achieve important public interest goals are not new to the Commission, nor are they anything like the rate regulation provisions set forth at the outset of Title II and cited in CTIA’s latest *ex parte*. The Commission’s rules require digital television broadcast licensees to provide “at least one over-the-air video program signal at no direct charge to viewers.”¹⁸ Relying on nothing other than its Title I and Title III mandates to regulate spectrum use in the public interest, the Commission determined of its own accord “to promote and preserve free, universally available, local broadcast television in a digital world” – doing so in order to assure “the preservation of broadcast television’s unique benefit: free, widely accessible programming that serves the public interest” and to “help ensure robust competition in the video market that will bring more choices at less cost to American consumers.”¹⁹ In other words, the Commission relied on its authority under Title III to require licensees to use at least a portion of their licensed spectrum for the provision of free service, specifically citing the public interest benefits of free, widely accessible service and greater competition as justification for such action. It promulgated rules requiring the provision of free service over spectrum licensed to broadcasters despite the fact that, as CTIA notes, broadcasters are not common carriers.²⁰

¹⁶ *Id.*

¹⁷ *Id.* ¶ 27 & n.62.

¹⁸ See 47 C.F.R. § 73.624.

¹⁹ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 5 (1997).

²⁰ See 47 U.S.C. § 153(10).

Marlene H. Dortch, Esq.

July 1, 2008

Page 5

Pursuant to Section 1.1206(b) of the Commission rules, an electronic copy of this letter is being filed. Please let me know if you have any questions regarding this submission.

Sincerely,

A handwritten signature in black ink, appearing to be 'Uzoma Onyeije', with a stylized, flowing script.

Uzoma Onyeije

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